

The Honorable Benjamin H. Settle

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA**

TODD BRINKMEYER,

Petitioner,

v.

WASHINGTON STATE LIQUOR AND
CANNABIS BOARD,

Respondent.

NO. 3:20-cv-05661-BHS

RESPONDENT'S
SUPPLEMENTAL BRIEFING IN
SUPPORT OF ITS MOTION FOR
SUMMARY JUDGMENT

NOTE ON MOTION CALENDAR:

OCTOBER 21, 2022

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I. INTRODUCTION

The dissent, rather than the majority in the First Circuit’s divided *Northeast Patients Group* decision, offered the analytic approach consistent with this Court’s prior rulings and that this Court should continue to follow. As this Court previously recognized, “As an arm of the federal government, this Court cannot order activity that remains federally illegal.” *Shelton v. Liquor & Cannabis Board*, No. C22-5135, 2022 WL 2651617, at *5 (W.D. Wash. July 8, 2022) (citation omitted). In line with this Court, the dissent in *Northeast Patients Group* correctly recognized: “[A]ppellees should not be able to receive a constitutional remedy in federal court to protect the sale and distribution of a controlled substance which remains illegal under federal law.” *Ne. Patients Grp. v. United Cannabis Patients & Caregivers of Maine*, 45 F.4th 542, 560 (1st Cir. 2022) (Gelpi, J., dissenting).

In contrast, the First Circuit held that Maine’s residency requirement for officers and directors of medical cannabis dispensaries violated the dormant Commerce Clause. *Ne. Patients Grp.*, 45 F.4th at 556. In so doing, it repeatedly relied on a congressional appropriations rider as evidence of congressional approval for a national medical cannabis market. *See id.* at 547, 549, 553. However, in considering this same rider, the Ninth Circuit recognized it did not and does not repeal the Controlled Substances Act (CSA). *See United States v. McIntosh*, 833 F.3d 1163, 1179 and n.5 (9th Cir. 2016); *United States v. Nixon*, 839 F.3d 885, 887-88 (9th Cir. 2016) (rejecting the argument that the appropriations rider suspended the CSA). Therefore, under the Ninth Circuit’s analysis, this Court should not find congressional approval for an interstate market in cannabis.

With cannabis’s status as federal contraband settled, the usual dormant Commerce Clause analysis does not apply. For this illegal market, there is no reason to ask if there is discrimination against interstate commerce or if there are undue burdens on interstate commerce, where the product and the sale of that product in an interstate market remains illegal. An illicit national market for illegal substances will always exist, but the dormant Commerce Clause

1 should not be invoked to protect that illicit market. The threshold question should be, does the
 2 dormant Commerce Clause apply at all? And for Washington’s cannabis market, the answer
 3 should be no, it does not.

4 II. SUPPLEMENTAL ARGUMENT

5 This Court should decline to follow the First Circuit’s non-binding authority, because:
 6 (1) The opinion relies on Congress’s tacit approval for a medical cannabis interstate market,
 7 whereas the Ninth Circuit has found otherwise; (2) The dormant Commerce Clause should not
 8 be used to protect a non-unified market consisting of federal contraband; (3) This Court should
 9 not use its equitable powers to support federal criminal activity; and (4) Extending dormant
 10 Commerce Clause protections to federal contraband circumvents Congress’s prohibition and
 11 causes serious implications for state regulation.

12 A. The First Circuit’s Holding Relies on an Interpretation of the Rohrabacher-Farr 13 Amendment that is Contrary to Ninth Circuit Law and Does Not Account for Washington’s Recreational Cannabis Intrastate Market

14 The First Circuit primarily based its holding that Maine’s medical cannabis residency
 15 requirements violated the dormant Commerce Clause on finding an interstate market for medical
 16 cannabis. *Ne. Patients Grp.*, 45 F.4th at 547-48. According to the First Circuit, both Congress’s
 17 Rohrabacher-Farr Amendment and Maine’s legislation contemplated and approved an interstate
 18 market for medical cannabis. *Id.* However, under Ninth Circuit law and in consideration of
 19 Washington’s intrastate cannabis framework, this Court should hold that the dormant Commerce
 20 Clause does not apply.

21 The First Circuit considered the Rohrabacher-Farr Amendment to be “the last word” by
 22 Congress on the legality of medical cannabis. *Id.* at 549. However, according to the Ninth Circuit,
 23 this reading of the Rohrabacher-Farr Amendment is incorrect. *See McIntosh*, 833 F.3d at 1179.
 24 Despite defunding enforcement, the Ninth Circuit noted cannabis remains illegal under federal
 25 law. *Id.* at n.5; *see also Nixon*, 839 F.3d at 888. Therefore, following the Ninth Circuit’s analysis
 26 in *McIntosh*, this Court should not rely on the congressional appropriations rider as evidence of

1 congressional support for an interstate cannabis market as the First Circuit did for the medical
2 cannabis market.

3 Additionally, the First Circuit opinion is limited to the medical cannabis market, a market
4 that does not exist as a separate market from recreational cannabis in Washington. In *Northeast*
5 *Patients Group*, the residency requirements at issue were for officers and directors of medical
6 cannabis dispensaries. *See Ne. Patients Grp.*, 45 F.4th at 544. The court's analysis leaned heavily
7 on the Rohrabacher-Farr Amendment, which solely affects enforcement for medical cannabis.
8 *Id.* at 547, 549, 553. This analysis of the medical cannabis market does not apply to Washington
9 because it does not have a separate medical market, as Maine did. Rather, after the passage of
10 the Cannabis Patient Protection Act in 2015, the medical and recreational markets were
11 integrated and all medical dispensaries were required to obtain licensure or close by July 2016.
12 2015 Wash. Sess. Laws 287-288, 304. Currently, a cannabis retail license may sell both
13 recreational and (with a special endorsement) medical grade cannabis. *See Wash. Rev.*
14 *Code* § 69.50.375 (2022). As Washington does not have a separate medical cannabis market to
15 which the Rohrabacher-Farr Amendment applies, this Court should not find congressional
16 support for its market to be interstate.

17 Moreover, Maine did not labor to create an intrastate market, as Washington did.
18 The First Circuit found Maine's cannabis legislation encouraged out-of-staters to participate in
19 the medical cannabis market as customers. *See Ne. Patients Grp.*, 45 F.4th at 547. The district
20 court further elaborated that these out-of-staters would presumably bring their cannabis back
21 home with them, thus creating an interstate market for medical cannabis. *See Ne. Patients Grp.*
22 *v. Maine Dep't of Admin. & Fin. Servs.*, 554 F. Supp. 3d 177, 184 (D. Me. 2021). In contrast,
23 Washington passed laws and promulgated regulations that endeavor to create a purely intrastate
24 cannabis market. *See Dkt. # 42* at p. 17-18. Washington law does not allow nonresidents to
25 obtain a medical cannabis card. *Id.* at p. 17 (citing *Wash. Rev. Code* § 69.51A.010(19)(a)(iii)
26 (2015)). It also warns residents and nonresidents that taking cannabis across state lines or onto

1 federal lands is illegal. *Id.* at 18. This Court should therefore not treat Washington’s regulatory
 2 scheme as one that embraces interstate commerce.

3 **B. The First Circuit Failed to Adequately Address Congress’s Intent to Prohibit a**
 4 **National Cannabis Market and Keep It Intrastate**

5 The First Circuit only briefly addressed whether dormant Commerce Clause protections
 6 can be applied if there is no legal market. *See Ne. Patients Grp.*, 45 F.4th at 556-57. It asked,
 7 “[W]hy . . . it would be improper for us to apply the dormant Commerce Clause here?” *Id.* at
 8 556. It then answered this question by stating, “There is an interstate market, and a state is trying
 9 to protect its advantageous position with respect to it.” *Id.* It therefore fails to treat the question
 10 of applicability as a threshold question. *See id.* As recognized by the dissent, only legal national
 11 markets merit the dormant Commerce Clause’s concern with states setting up trade barriers and
 12 discriminating against out-of-state competitors. *See id.* at 559 (dissent). Other courts concur.
 13 *See Pic-A-State PA, Inc. v. Pennsylvania*, 42 F.3d 175, 179-80 (3d Cir. 1994); *Predka v. Iowa*,
 14 186 F.3d 1082, 1085 (8th Cir. 1999); and *Terk v. Ruch*, 655 F. Supp. 205, 215 (D. Colo. 1987).

15 The First Circuit relies on *Zook* and *Pic-A-State* to support its conclusion that the dormant
 16 Commerce Clause should apply to the medical cannabis market; however, in the Ninth Circuit,
 17 these cases support the conclusion that the dormant Commerce Clause should not apply to the
 18 cannabis market. *See Ne. Patients Grp.*, 45 F.4th at 557 (citing *California v. Zook*, 336 U.S. 725,
 19 726 (1949); *Pic-A-State PA, Inc.*, 42 F.3d at 179-80. The difference in outcome turns on whether
 20 there is a finding of congressional approval for an interstate market. In *Zook* and *Pic-A-State*,
 21 the courts declined to apply the dormant Commerce Clause to strike down state statutes that
 22 aligned with congressional intent to prohibit an interstate market. *See Zook*, 336 U.S. at 735-38;
 23 *Pic-A-State PA, Inc.*, 42 F.3d at 179. In *Northeast Patients Group*, the First Circuit found
 24 Congress intended for there to be an interstate market in medical cannabis. *See Ne. Patients Grp.*,
 25 45 F.4th at 549. Despite this intent, Maine instituted residency restrictions for medical cannabis
 26 dispensaries for “pure[ly] protectionis[t]” reasons. *See id.* at 550. Therefore, for medical

1 cannabis, the First Circuit concluded that Maine’s residency requirements impermissibly set up
 2 trade barriers to an interstate market contemplated by Congress and should be struck down under
 3 the dormant Commerce Clause. *Id.* at 553-56.

4 This same rule of congressional intent compels a different result for Washington’s
 5 cannabis market that involves recreational cannabis. Under *Zook*, it is congressional intent – and
 6 not the still standing illegal market – that matters. *See Zook*, 336 U.S. at 730-31. Furthermore,
 7 as articulated by the Third Circuit in *Pic-A-State*, “Where Congress has proscribed certain
 8 interstate commerce, . . . it does not offend the purpose of the Commerce Clause for states to
 9 discriminate or burden that commerce.” *Pic-A-State PA, Inc.*, 42 F.3d at 179. Here, although
 10 there may be a national illegal market for cannabis, Congress intended to prohibit all cannabis
 11 markets. *See Gonzales v. Raich*, 545 U.S. 1, 26 (2005). Washington’s Residency Requirements
 12 are part of a regulatory scheme meant to keep the cannabis market intrastate and compliant with
 13 the federal guidelines articulated in the *Cole* memo. *See* Dkt. # 42 at p. 17-18; Dkt. #32, Ex. 1.
 14 Therefore, like the courts in *Zook* and *Pic-A-State*, this Court should not apply the dormant
 15 Commerce Clause to strike our state’s Residency Requirements down. Instead, this Court should
 16 follow the Third Circuit and Eighth Circuits, which held that the dormant Commerce Clause is
 17 not implicated for contraband. *See Pic-A-State*, 42 F.3d at 179; *Predka*, 186 F.3d at 1085; *see also*
 18 *Terk*, 655 F. Supp. at 215.

19 Additionally, under *General Motors v. Tracy*, this Court could find that the dormant
 20 Commerce Clause does not apply to the cannabis industry, because it consists of multiple, non-
 21 unified intrastate markets. *See Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 299 (1997). In that case,
 22 the Supreme Court held that the dormant Commerce Clause did not apply to state-siloed non-national
 23 markets for natural gas. *Id.* at 300. Here, the cannabis industry is also a market consisting of state-
 24 siloed, non-national markets. In fact, the Rohrbacher-Farr Amendment, taken in context of the
 25 *Cole* memo and the CSA, should be read to signal support for multiple, independent intrastate
 26 markets, subject to alternate state regulations – not a national market where states are engaging in

1 illegal narcotics trafficking. This interpretation heeds the CSA and allows states to act as the
 2 laboratories of democracy. *Cf. Gamble v. United States*, 139 S. Ct. 1960, 1969 (2019). Under *Tracy*,
 3 the dormant Commerce Clause does not apply to strike down these state regulations, because there
 4 is no national market to protect. 519 U.S. at 300. The First Circuit did not address this second basis
 5 for not applying the dormant Commerce Clause to the cannabis market, but it is squarely before this
 6 Court. *See* Dkt. # 42 at p. 10-11.

7 **C. Federal Courts Cannot Give Equitable Remedies to Businesses that Want to Engage**
 8 **in Federal Criminal Activity**

9 The First Circuit also briefly addressed the dissent’s argument that a federal court cannot
 10 use its equitable powers to protect activity that is criminal under federal law. *See Ne. Patients*
 11 *Grp.*, 45 F.4th at 557. In affirming the district court’s injunction, the First Circuit again relied on
 12 the fact that Congress barred enforcement of the federal criminal prohibition for medical
 13 cannabis. *Id.* at 557-58. It also suggested that a federal court should ignore the illegal status of
 14 cannabis and intercede, where, as it found, a business is suffering a constitutional harm. *Id.*
 15 However, as demonstrated *supra*, there is no dormant Commerce Clause harm when the product,
 16 per the Ninth Circuit, is federal contraband. Likewise, this Court recognizes that cannabis
 17 continues to be illegal under the CSA. *See* Show Cause Order, Dkt. # 17 at p. 2. Therefore,
 18 “Brinkmeyer is requesting that this Court declare unconstitutional laws that prevent him from
 19 engaging in the business of cultivating a controlled substance . . . [and] allow[] [him] to
 20 participate in violations of the CSA.” *Id.* This Court should reject that request, as it has others.
 21 *See, e.g., Shelton*, 2022 WL 2651617, at *5.

22 **D. Extending Dormant Commerce Clause Protections to Federal Contraband**
 23 **Circumvents Congress’s Regulation of Commerce and Causes Serious Implications**
 24 **for State Regulation**

25 The First Circuit’s decision applies the dormant Commerce Clause based on its
 26 conclusion that Congress’s efforts to eradicate cannabis from the interstate market is not
 completely effective, as evinced by the continued existence of illicit markets. *See Ne. Patients*

1 *Grp.*, 45 F.4th at 547-48. Application of the Commerce Clause, however is tied to Congress's
 2 intent to regulate an article, not performance outcomes of Congress's attempted regulation. And
 3 the CSA makes plain Congress's intent to exclude cannabis from the interstate market. *Raich*,
 4 545 U.S. at 26.

5 Indeed, the federal government continues to enforce the CSA with regard to cannabis
 6 throughout the country. According to recent data from the Drug Enforcement Administration, in
 7 2021, federal law enforcement agents seized over 5.5 million cannabis plants, 743,920 pounds
 8 of processed cannabis, excluding wax/oil and edibles, and made more than 6,600 cannabis
 9 related arrests.¹ Seizures and arrests occurred in every state including those with regulated
 10 markets such as Washington. These numbers represent a 20 percent increase in seizures and 25
 11 percent more arrests than the previous year. Indeed, the DEA reports that it is "aggressively
 12 striving to halt the spread of cannabis cultivation in the United States."² There is no question
 13 that cannabis remains federally illegal, or that Congress did not intend to allow an illegal
 14 interstate market. Without which, this Court should not extend dormant Commerce Clause
 15 protection to cannabis and thereby, sanction an interstate market.

16 Adopting the First Circuit's holding that cannabis production and distribution is entitled
 17 to dormant Commerce Clause protection contorts the role of the judiciary vis-à-vis congressional
 18 Commerce Clause powers and traditional state police powers. It circumvents Congress's
 19 exercise of its Commerce Clause powers to ban cannabis from the market. It is Congress who
 20 decides whether a national market should exist, and absent legislation, courts should not extend
 21 dormant Commerce Clause protection to a market that Congress declared illegal. A decision here
 22 that holds interstate cannabis production and distribution is protected has a significant impact on
 23 a state's ability to protect public health and safety by tightly regulating cannabis and keeping it

24 ¹ 2021 Final Domestic Cannabis Eradication/Suppression Program Statistical Report, *available*
 25 *at*: [https://www.dea.gov/sites/default/files/2022-](https://www.dea.gov/sites/default/files/2022-03/Copy%20of%202021%20DCESP%20Program%20Stats-converted.xlsx)
 26 [03/Copy%20of%202021%20DCESP%20Program%20Stats-converted.xlsx](https://www.dea.gov/sites/default/files/2022-03/Copy%20of%202021%20DCESP%20Program%20Stats-converted.xlsx).

² Domestic Cannabis Suppression / Eradication Program, *available at*:
<https://www.dea.gov/operations/eradication-program>.

“out of the hands of illegal drug organizations.” *See* Dkt. # 39 at p. 12-13; 2013 Wash. Sess. Laws 29. For example, states with regulated markets, either medical or recreational, could be limited in their ability to prevent the import or export of cannabis, i.e., federal contraband, if cannabis is protected by the dormant Commerce Clause. This result is not what the constitutional framers intended, despite their parallel worries regarding trade barriers for legal commerce such as apples and livestock. In the end, the dormant Commerce Clause should not be used to trump Congress’s exercise of its Commerce Clause powers to ban cannabis from the national market.

III. CONCLUSION

In conclusion, *Northeast Patients Group*, does little to disturb the arguments before this Court. The First Circuit’s holding depends on a finding of a national market for medical cannabis and congressional support in an appropriations rider that solely concerned medical cannabis. However, the *McIntosh* Ninth Circuit reached a contrary conclusion regarding the effect of the rider. Moreover, this rider poses little to no consequence for Washington’s integrated medical and recreational cannabis market. Therefore, this Court should follow the *Tracy* Supreme Court and Eighth and Third Circuit holdings that the dormant Commerce Clause does not apply to non-unified intrastate markets involving federal contraband.

DATED this 21st day of October 2022.

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